



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 22 2016

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The U.S. Environmental Protection Agency is notifying Congress of the enclosed determinations authorizing use of government-owned vehicles for home-to-work transportation. Under Federal Management Regulation Part 102-5, EPA On-Scene Coordinators (OSCs), required by the agency to be in On-Call Duty Status in regional offices, field offices and outpost locations, are authorized for an initial period of 15 days, and a further period of 90 days, to use government-owned vehicles for transportation between their residence(s) and place(s) of EPA employment when officially required.

U.S. EPA's Office of General Counsel (OGC) has issued an opinion impacting home-to-work authorization previously provided to certain EPA employees. Previously, the agency authorized home-to-work transportation for on-call OSCs under the field work exception to the general prohibition on such use, at 31 U.S.C. 1344(a)(2)(A). OGC recently issued a legal opinion that on-call OSCs who are not actually performing field work should not be authorized home-to-work transportation under this authority (enclosed). A temporary transitionary period is needed to enable the agency to adopt new approaches to such transportation without disrupting agency operations.

As a result, the emergency response program will transition to alternatives that will minimize the operational impact on this important environmental response program, such as basing the vehicles at locations near the responders' residences, in accordance with 41 C.F.R. §102-5.90.

If you have questions, please contact us, or your staff may contact Carolyn Levine in EPA's Office of Congressional and Intergovernmental Relations at levine.carolyn@epa.gov or at (202) 564-1859.

Sincerely,

A handwritten signature in black ink, appearing to read "Mathy Stanislaus".

Mathy Stanislaus
Assistant Administrator
Office of Land and Emergency Management

A handwritten signature in black ink, appearing to read "Donna Vizian".

Donna Vizian
Acting Assistant Administrator
Office of Administration and
Resources Management

Enclosures



THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DETERMINATIONS BY THE ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AUTHORIZING USE OF GOVERNMENT OWNED VEHICLES FOR HOME-TO-WORK TRANSPORTATION PURSUANT TO 41 C.F.R. PART 102-5 FOR CIRCUMSTANCES THAT CONSTITUTE COMPELLING OPERATIONAL CONSIDERATIONS

The U.S. Environmental Protection Agency Administrator makes the following determinations and approval of use under Federal Management Regulation (FMR) Part 102-5:


1. The EPA's Office of General Counsel has issued an opinion impacting home-to-work authorization previously provided to certain EPA employees. There is a compelling operational need for a temporary transitional period to enable the EPA to adopt new approaches to such transportation without disrupting agency operations.
2. Accordingly, EPA employees in the following positions are hereby authorized for an initial period of 15 days to use government-owned vehicles for transportation between their residences and places of EPA employment when officially required:

On-Scene Coordinators (OSCs) required by the EPA to be in on-call duty status in Regional Offices, Field Offices and outpost locations.

3. Furthermore, because a compelling operational need will continue to exist beyond this initial period of 15 days, these employees are hereby authorized for a subsequent period of 90 days to use government-owned vehicles for transportation between their residences and places of EPA employment when officially required.
4. Government-owned vehicle transportation is necessary between residence and place of EPA employment for the following reasons:

Relying upon a July 7, 1998, EPA Office of General Counsel memorandum, the EPA has up to this time authorized home-to-work transportation for on-call OSCs under the field work exception to the general prohibition on such use, at 31 U.S.C. 1344(a)(2)(a). Recently, however, when asked to review this authority, OGC issued a new memorandum, which is attached, that supersedes the 1998 memorandum and holds that on-call OSCs who are not actually performing field work should not be authorized home-to-work transportation under this authority. As a result, the emergency response program will transition to alternative practices that will allow the program to carry out its response capabilities after hours in the most efficient manner, while remaining compliant with 41 U.S.C. §1344.

5. In order to implement a new protocol in a manner that will minimize the operational impact on this important environmental response program, sufficient time is needed to identify and secure locations to base these vehicles. During this transitional period the EPA must avoid significant disruption of its critical emergency response capabilities. Having emergency response vehicles in close proximity to the responders at all times allows for the most efficient response to an incident and is also consistent with the EPA's role under the governmentwide national continuity program, as emergency oil and hazardous materials response has been designated as the agency's primary mission essential function¹.
6. The above-described circumstances are within the meaning of FMR Part 102-5.
7. Use of government-owned vehicles for home-to-work transportation by OSCs required by the EPA to be in an on-call duty status in Regional Offices, Field Offices, and outpost locations is essential to the conduct of official business and will substantially increase the efficiency and economy of the agency. The use is not for the personal comfort or convenience of the employees.
8. The initial determination and approval shall be effective for a period of 15 consecutive calendar days, beginning with the first day of motor vehicle usage on or about May 25, 2016. The subsequent determination shall be effective for a subsequent 90 consecutive calendar days, but only if the same circumstances underlying this determination and approval continue to exist.
9. Administrative controls to validate use of these determinations: A record of home-to-work use will be maintained by each employee using home-to-work transportation, in accordance with 41 C.F.R. §102-5.120.


Gina McCarthy

5/26/16
Date

¹ Under Homeland Security Presidential Directive-20 (HSPD-20), "Primary Mission Essential Functions," or "PMEFs," are those government functions that must be performed in order to support or implement the performance of national essential functions before, during and in the aftermath of an emergency.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

SUBJECT: Official Use of Government-Owned Vehicles

MAY 25 2006

FROM: Elise B. Packard *EBP*
Associate General Counsel
Civil Rights and Finance Law Office

TO: Vaughn Noga
Director
Office of Administration
Office of Administration and Resources Management

This memorandum responds to your request for legal advice regarding authorization of home-to-work transportation for "on call" employees, who are not actually performing field work, but need immediate access to emergency response government-owned vehicles (GOVs) in order to respond to emergencies that could arise after hours. As described below, this practice generally does not fit within the field work exception. While home-to-work transportation for these responders may be authorized on a short-term basis when the Administrator determines in writing that an emergency situation has arisen or that compelling operational considerations require it, this type of determination is generally not designed for long-term home-to-work authorized use. If such a determination cannot be made, our Office is available to work with you to explore viable alternatives to address the needs of the response personnel and the Agency.

DISCUSSION

31 U.S.C. §1344(a) ("the Statute") authorizes the expenditure of appropriated funds "for the maintenance, operation, or repair of a passenger carrier"¹ only if the vehicle is used to provide transportation for "official purposes." The Statute prohibits all use of GOVs for non-official purposes, unless otherwise authorized.

¹ *Passenger carrier* means a motor vehicle, aircraft, boat, ship, or other similar means of transportation that is owned (including those that have come into the possession of the Government by forfeiture or donation), leased, or rented (non-TDY) by the United States Government. 41 C.F.R. §102-5.30.

With respect to home-to-work transportation, 31 U.S.C. §1344(a)(1) specifically provides that:

“...transporting any individual other than the individuals listed in subsections (b) and (c) of this section between such individual’s residence and such individual’s place of employment is not transportation for an official purpose.” (Emphasis added.)²

Subsections (b) and (c) list positional exceptions, including, among others, individuals designated by the President, as is the case with the EPA Administrator.³ The two types of exceptions examined in this memorandum are the §1344(a)(2)(A) field work exception and the §1344(b)(9) emergency exceptions.⁴

Section 1344(a)(2)(A) states that, for purposes of §1344(a)(1), home-to-work transportation “required for the performance of field work,” in accordance with regulations prescribed by GSA, is “transportation for an official purpose” when approved in writing by the Administrator.⁵ This is commonly referred to as “the field work exception.” GSA regulations define field work as:

“... official work requiring the employee’s presence at **various** locations other than his/her regular place of work. (Multiple stops (itinerant-type travel) within the accepted local commuting area, limited use beyond the local commuting area, or transportation to remote locations that are only accessible by Government-provided transportation are examples of field work.)” 41 C.F.R. §102-5.30 (Emphasis added).

² The Statute establishes rigorous procedures for authorizing home-to-work transportation and establishes penalties for unofficial uses, making it clear that Congress is concerned about possible abuse in this area. “An officer or employee who willfully uses or authorizes the use of a passenger motor vehicle or aircraft owned or leased by the United States Government . . . shall be suspended without pay by the head of the agency. The officer or employee shall be suspended for at least one month, and when circumstances warrant, for a longer period or summarily removed from office.” 31 U.S.C. §1349; 41 C.F.R. §102-34.225.

³ Though not relevant for purposes of this memorandum, §1344(a)(2)(B) provides that home-to-work transportation is also permissible when it is essential for the safe and efficient performance of intelligence, counterintelligence, protective services, or criminal law enforcement duties.

⁴ This memorandum does not address the authority of an employee to use a GOV or rental vehicle when the employee is under a valid travel authorization, and the travel authorization allows the employee to drive the vehicle between his or her home and an official duty station or other destination. Transportation of employees who are in official travel status is not governed by 31 U.S.C. §1344 or the applicable GSA regulations. 41 C.F.R. §102-5.20; 70 Comp. Gen. 196 (1991).

⁵ GSA was tasked by Congress with drafting the field work exception regulations. (“In promulgating regulations . . . the Administrator of General Services shall provide criteria defining the term “field work” for purposes of subsection (a)(2)(A) of this section....”) 31 U.S.C. §1344(e)(2).

When making a determination to authorize home-to-work transportation for field work, the regulations direct that the Agency should consider the following: "(a) The location of the employee's home in proximity to his/her work and to the locations where non-TDY travel is required⁶; and (b) The use of home-to-work transportation for field work should be authorized only to the extent that such transportation will substantially increase the efficiency and economy of the Government." 41 C.F.R. §102-5.70.

The regulations also set forth examples of situations that do not establish a basis for authorizing home-to-work transportation for field work. They include:

- (a) When an employee assigned to field work is not actually performing field work;
- (b) When the employee's workday begins at his/her work; or
- (c) When the employee normally commutes to a fixed location, however far removed from his/her official duty station (for example, auditors or investigators assigned to a defense contractor plant).

41 C.F.R. §102-5.75.

Furthermore, the regulations provide:

For instances where an employee is authorized home-to-work transportation under the field work provision, but performs field work only on an intermittent basis, the agency shall establish procedures to ensure that a Government passenger carrier is used only when field work is **actually being performed**. . . . " Note to 41 C.F.R. §102-5.75 (Emphasis added).

Finally, 41 C.F.R. §102-5.95 provides that the comfort and/or convenience of an employee is not sufficient justification to authorize home-to-work transportation.

In two memoranda, dated January 7, 1998 and July 7, 1998, we addressed the field work exception's applicability to employees placed in "standby duty status," which essentially meant they were "on call" in order to respond to emergencies at any time of day. The July 7, 1998 memorandum is superseded by this memorandum, which explains the field work exception in more detail and addresses the "actually being performed" component of the regulation.

To the extent employees are *actually* conducting field work on the days when they are on call or in standby duty status, and a proper field work determination is made, we believe home-

⁶ Note that the mere fact that one's residence is also designated as that person's official duty station does not itself authorize the use of the vehicle from that employee's home. There is no exception in 31 U.S.C. §1344 for use of a vehicle from one's home when the home is designated as the employee's official duty station. GSA counsel has advised that the employee would have to meet one of the exceptions for having the GOV at his or her home, such as a field work determination or compelling operational need.

to-work transportation is authorized. However, as described to us, the current practice is that certain employees, while in a standby or on call status, are not actually conducting field work. While they *may* be called upon to do field work, the locations are unknown. To the extent the July 7, 1998 memorandum can be interpreted as allowing standby or on call status in itself to permit home-to-work transportation under the field work exception, this memorandum serves to clarify that the statute and regulations do not authorize this practice.⁷ A 2006 Comptroller General decision, described below, underscores this principle. Moreover, the GSA Internal Motor Vehicle Management Guidance plainly states, "an employee . . . subject to call on a 24-hour basis is not considered adequate justification for authorizing home-to-work transportation."

To cover emergency-type situations, the Statute at §1344(b)(9) provides that the Administrator may authorize short-term home-to-work transportation for an employee only when specified situations arise. The Administrator must make a written determination "that highly unusual circumstances present a clear and present danger, that an emergency exists, or that other compelling operational considerations make such transportation essential to the conduct of official business." In all of these situations, a written determination by the EPA Administrator is required, and the determination is effective for not more than 15 calendar days, with the possibility of 90-day extensions. Notification of these determinations must be transmitted to Congress.⁸

⁷ Looking to legislative history, one concern of legislators at the time 31 U.S.C. §1344 was amended was that employees in an "on call" status responding to emergencies would not be able to take GOVs home under the "field work exception," but rather would have to return to the office for the GOVs. Therefore, they created a new exception category for employees who might need to respond to emergencies at all hours. The new category that was created, however, was limited to employees performing intelligence, counterintelligence, protective services, and criminal law enforcement functions, now found at 31 U.S.C. §1344(a)(2)(B), and is not applicable here.

"Agencies such as the FBI, Secret Service, and the DEA have relied on the field work exception to permit a limited number of agents to take their vehicles home to ensure that the agency had an emergency response capability. These agents who would be on call during the night would be able to respond to emergency situations without having to first get back to a government garage where they could obtain a government vehicle. In response to GAO findings that non law enforcement agencies were abusing the field work exception, H.R. 3614 narrows the definition of the field work exception....The language, while appropriate to eliminate abuses in other contexts, would virtually eliminate the ability of agencies carrying out law enforcement, foreign intelligence, counterintelligence and protective functions to provide emergency response capabilities....To remedy this problem, I proposed to create a narrow exception to restrictions contained in the bill....It permits home to work transportation for officers or employees of certain executive agencies where such transportation is necessary for the safe and efficient performance of intelligence, counterintelligence, protective, or criminal law enforcement functions specifically assigned to such officer or employee by the head of the agency. I believe that the bill as now drafted preserves all the essential features of H.R. 3614 while curing its most important defect. 132 Cong. Rec. 30250-30251 (Oct. 10, 1986) (Statement of Sen. Leahy).

⁸ Emergency determinations may also be made in advance for employees who are expected to respond to unusual circumstances when they arise (so-called "contingency determinations"). 41 C.F.R. §102-5.50. The benefit of a contingency determination is that it eliminates the need to obtain a written authorization from the Administrator at the time an emergency event actually occurs. Rather, the

"Clear and present danger" is defined as highly unusual circumstances that present a threat to the physical safety of employees or their property where the danger is real and immediate. 41 C.F.R. §102-5.30. An "emergency" means circumstances that exist when there is an immediate, unforeseeable and temporary need to provide home-to-work transportation for employees necessary to the uninterrupted performance of the agency's mission. Id. "Compelling operational considerations" refers to circumstances where home-to-work transportation is essential to the conduct of official business or would substantially increase a Federal agency's efficiency and economy. Id.

The Comptroller General's Office has addressed the issue of on call emergency transportation and has opined that "[t]he fact that emergency conditions may necessitate additional trips or otherwise increase commuting costs does not alter the employee's responsibility to provide for his or her own home-to-work transportation." See Matter of NOAA-Reimbursing Mileage for Commuting Expense for On-Call Emergencies, B-307918, December 20, 2006 (citing 60 Comp. Gen. 420 (1981)). The case involved government employees who were on call and had to perform after-hours emergency work during severe weather. They received standby pay or overtime pay while in this status. In addressing whether the government could reimburse the employees for mileage traveled between their residences and workplace during these emergencies, the Comptroller General's Office determined that the only exception under 31 U.S.C. §1344 that would allow appropriated funds to be used for transportation between their homes and places of employment was under the emergency exception in §1344(b)(9), provided the detailed procedures of that section were followed.⁹

Absent one of these situations occurring, home-to-work transportation would not be authorized for on call employees. An alternative we recommend is basing emergency response vehicles at facilities located near their employees' residences, in accordance with 41 C.F.R. §102-5.90. We know that identifying and securing locations to base these vehicles will take time, but recommend that implementation begin as soon as possible. In the interim, it is our further recommendation that you seek a determination from the Administrator that compelling operational considerations require immediate home-to-work transportation authorization for on-call emergency response personnel. Since the lack of such an authorization during this transitionary stage would impact emergency response program operations significantly, a determination could be made that temporary home-to-work transportation authority is essential

Administrator, at any time, may approve a contingency determination, which includes the names of authorized individuals or specified positions, the situations upon which the provision of home-to-work transportation is contingent, and any appropriate administrative controls. Implementation of a contingency determination, however, only occurs when an actual emergency event occurs, not in anticipation of an event occurring. Presumably, a supervisor would invoke the contingency determination when an emergency situation arises, and the employee would then be authorized to use the GOV for home-to-work transportation consistent with the regulations. As with the emergency determinations above, contingency determinations, once invoked, are only effective for up to 15 calendar days, with the possibility of 90-day extensions by the Administrator.

⁹ It was determined that the on call employees did not qualify for the (b)(9) exception because the detailed procedures and durational requirements of this exemption were not met.

to the conduct of official business and would substantially increase the Agency's efficiency and economy.

CONCLUSION

Home-to-work transportation is not authorized under the field work exception for on-call employees who will not actually be performing field work. Such transportation for emergency responders can only be authorized on a short-term basis when the Administrator determines in writing that highly unusual circumstances present a clear and present danger, that an emergency exists, or that other compelling operational considerations make such transportation essential to the conduct of official business. Our Office is available to work with you to explore viable mechanisms to address the needs of the response personnel.

If you have further questions concerning this memorandum, please contact Ann Sisson at 202-564-5469.